NOR AZLINA ABDUL AZIZ v. EXPERT PROJECT MANAGEMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
KAMARDIN HASHIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1941-11-2015]
27 FEBRUARY 2017

CONTRACT: *Agreement – Breach – Conditions precedent that approval for conversion of land must be obtained within specific time – Whether compliance mandatory for contract to remain valid and binding – Delay in obtaining approval for conversion of land – Whether there was breach of agreement due to conduct of parties – Whether failure to fulfil conditions precedent would render contract automatically terminated – Whether contract valid*

The respondent ('the defendant'), a housing developer, had entered into an agreement ('the agreement') with the appellant ('the plaintiff') pertaining to the development and construction of the latter's land. Clause 5 of the agreement provided that the defendant was required to obtain approvals, consents, permits and licenses required by the relevant authorities for development of the land within one year from the date of the agreement ('the conditions precedent'). The defendant obtained the approval for conversion of the said land from agricultural to residential land after the expiry of the condition date. This caused the plaintiff to issue a notice to the defendant for their failure in fulfilling the conditions precedent within the time frame stipulated. The plaintiff granted to the defendant an extension of time to fulfil the conditions precedent but the defendant failed to fulfil the same. The plaintiff commenced an action against the defendant at the High Court for, *inter alia*, (i) declarations that (a) the defendant had breached the terms of the agreement; (b) the plaintiff was entitled to terminate the agreement on the defendant's breach or alternatively that the agreement was terminated automatically; and (c) the plaintiff was entitled to forfeit the deposit in the sum of RM200,000 ('the deposit') on the defendant's breach; and (ii) an order that the defendant hands over vacant possession of the land. In turn, the defendant filed a counterclaim seeking a sum of RM9,276,767 being the costs expended by the defendant under the agreement. In dismissing the plaintiff's claim and allowing the defendant's counterclaim, the trial judge held that (i) the agreement was not terminated due to the conduct of both parties; and (ii) it was the conduct of the plaintiff which had prevented the defendant from continuing its work, thereby unilaterally terminating the agreement. Hence, the present appeal.

Held (allowing appeal; setting aside order of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The parties agreed that the conditions precedent, as set out in the agreement, had to be complied with within the time stipulated for the contract to remain valid and binding. Since there was failure to do so, the contract was automatically discharged. This crucial issue was overlooked by the trial judge. (para 28)

(2) Failure to fulfil the conditions precedent would render the contract automatically terminated as stated in cl. 5 of the agreement. In view of this automatic termination, there was no longer any requirement of any notice of termination. Once the conditions precedent were not fulfilled within the stipulated period or any agreed extended period, the agreement would automatically come to an end. There was no ambiguity in what the parties signed up for. The court is duty bound to uphold what the parties had bargained for in the agreement and more particularly cl. 5. (para 31)

(3) Once the conditions precedent were not fulfilled within the stipulated period, the contract became null and void and the parties were then relieved from performing the rest of the obligations. Contrary to the finding by the trial judge, there was no breach by the plaintiff. It was the defendant who failed to fulfil its promise to obtain all approvals, as stated in cl. 5, which were stipulated to be the conditions precedent to be performed by the unconditional date which included any agreed period of extension. (para 32)

(4) The decision of the High Court was plainly wrong. The trial judge failed to apply the principles of law relating to an automatic termination clause, resulting in a fundamental misdirection. The declaration sought by the plaintiff that the agreement was automatically terminated was allowed with the result that the deposit was to be refunded to the defendant. The defendant's counterclaim was without merit and was dismissed. The defendant was ordered to hand over vacant possession of the land to the plaintiff. (para 34)

Bahasa Malaysia *Headnotes*

Responden ('defendan'), pemaju perumahan, telah memeterai satu perjanjian ('perjanjian') dengan perayu ('plaintif') bagi pemajuan dan pembangunan tanah plaintif. Klausa 5 perjanjian memperuntukkan bahawa defendan perlu mendapatkan kelulusan, kebenaran, permit dan lesen yang diperlukan oleh pihak berkuasa yang relevan bagi pembangunan tanah dalam masa satu tahun dari tarikh perjanjian ('syarat duluan'). Defendan memperoleh kelulusan bagi konversi tanah daripada tanah agrikultur kepada kediaman selepas luput tarikh syarat tersebut. Ini menyebabkan plaintif mengeluarkan notis kepada defendan atas kegagalannya memenuhi syarat duluan dalam jangka masa yang ditetapkan. Plaintif memberi lanjutan masa kepada defendan untuk

memenuhi syarat duluan tetapi defendan gagal memenuhinya. Plaintif memulakan tindakan terhadap defendan di Mahkamah Tinggi bagi, antara lain, (i) pengisytiharan bahawa (a) defendan telah melanggar terma perjanjian; (b) plaintif berhak menamatkan perjanjian berdasarkan pelanggaran oleh defendan atau secara alternatifnya, perjanjian ditamatkan secara automatik; dan (c) plaintif berhak melucut hak deposit berjumlah RM200,000 ('deposit') akibat pelanggaran defendan; dan (ii) satu perintah agar defendan menyerahkan milikan kosong tanah. Sebaliknya, defendan memfailkan tuntutan balas bagi jumlah RM9,276,767 iaitu kos yang dikeluarkan oleh defendan bawah perjanjian itu. Dalam menolak tuntutan plaintif dan membenarkan tuntutan balas defendan, hakim bicara memutuskan (i) perjanjian tersebut tidak tamat akibat tindakan pihak-pihak; dan (ii) tindakan plaintif yang menghalang defendan daripada meneruskan kerja yang sebenarnya menamatkan perjanjian secara unilateral. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Pihak-pihak bersetuju bahawa syarat duluan, seperti yang termaktub dalam perjanjian, perlu dipatuhi dalam masa yang ditetapkan agar kontrak kekal sah dan mengikat. Oleh kerana terdapat kegagalan berbuat sedemikian, kontrak tamat secara automatik. Hakim bicara terlepas pandang isu penting ini.

(2) Kegagalan memenuhi syarat duluan akan menjadikan kontrak tamat secara automatik, seperti yang diperuntukkan di bawah kl. 5 perjanjian. Berdasarkan penamatan automatik ini, tiada lagi keperluan notis penamatan. Apabila syarat duluan tidak dipenuhi dalam masa yang ditetapkan atau apa-apa tempoh lanjutan, perjanjian tamat secara automatik. Tiada kesamaran dalam apa-apa yang pihak-pihak meterai. Mahkamah bertanggungjawab mengesahkan apa yang pihak-pihak setujui dalam perjanjian, khususnya kl. 5.

(3) Apabila syarat duluan tidak dipenuhi dalam masa yang ditetapkan, kontrak menjadi tidak sah dan terbatal dan pihak-pihak terlepas daripada menjalankan kewajipan-kewajipan lain. Bertentangan dengan dapatan hakim bicara, tiada pelanggaran oleh plaintif. Defendan yang gagal menepati janjinya untuk mendapat semua kelulusan, seperti yang dinyatakan dalam kl. 5, yang dinyatakan sebagai syarat duluan yang perlu dipenuhi oleh tarikh tidak bersyarat, termasuk apa-apa tempoh lanjutan yang disetujui.

(4) Keputusan Mahkamah Tinggi jelas terkhilaf. Hakim bicara gagal mengguna pakai prinsip undang-undang berkaitan klausa penamatan automatik, menyebabkan salah arah asasi. Pengisytiharan yang dipohon

A oleh plaintif agar perjanjian ditamatkan secara automatik dibenarkan dan deposit perlu dipulangkan kepada defendan. Tuntutan balas defendan tidak bermerit dan ditolak. Defendan diarahkan menyerahkan milikan kosong tanah kepada plaintif.

B **Case(s) referred to:**
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***
Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal [2010] 3 CLJ 377 CA ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
C *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd [2013] 1 LNS 625 CA* ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***
Langkawi R&D Academy Sdn Bhd v. Ketua Setiausaha Kementerian Pertahanan Malaysia & Ors [2013] 3 CLJ 1006 CA ***(refd)***
D *Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA* ***(refd)***
Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416 CA ***(refd)***
Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd [2008] 2 CLJ 284 CA ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

E *For the appellant - M Vinoben & Norazmi Norazman; M/s Azmi Fadzly Maha & Sim*
For the respondent - Harpal Singh Grewal, Abd Shukor Ahmad, Khu Kim Guat & Reny Rao; M/s Shukor Baljit & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22 NCVC-261-05-2014 (overruled).]

F *Reported by Najib Tamby*

JUDGMENT

Harmindar Singh Dhaliwal JCA:

G **[1]** This is an appeal against the decision of the High Court at Kuala Lumpur delivered on 30 October 2015 after a full trial. The High Court had dismissed the appellant's claim and allowed the respondent's counterclaim with special damages in the sum of RM1,194,257.02, general damages in the sum of RM2,000,000, refund of a deposit of RM200,000 and costs of RM30,000.

H

[2] This appeal was heard on 14 September 2016. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow. For convenience, the parties will be referred to as they were in the High Court.

I

Salient Facts

[3] The salient facts giving rise to the civil suit can be stated as follows. The plaintiff is the registered owner of all that land held under GM 4430, Lot No. 13144, Tempat Perimbun, Mukim and District of Hulu Langat, State of Selangor ("the said land"). The defendant is a private limited company and its principal business is that of a housing developer.

[4] The plaintiff and the defendant entered into a joint venture agreement known as the heads of agreement dated 11 September 2012 ("the agreement"). The salient terms and conditions of the agreement that concern the dispute in this appeal were as follows:

(a) The defendant was to construct on the said land three bungalows on the plaintiff's lots, identified as lots 1, 2 and 5 ("the plaintiff's lots") and also a shared lot, that is, on lot 3 ("the shared lot") within the stipulated period. The remaining nine lots are to be developed by the defendant and known as the company's lots ("the defendant's lots"). The defendant was to carry out the development of the said land comprising 13 bungalows with infrastructure at the cost and expense of the defendant.

(b) Clause 5 provided for the conditions precedent, that within one year from date of the agreement (11 September 2012), known as the "conditional period" with 11 September 2013 being known as the "unconditional date", the defendant shall obtain all the approvals, consents, permits and licences required by the relevant authorities for development of the said land pertaining to the following:

(i) Planning permission;

(ii) Building plan approval for the plaintiff's lots;

(iii) Conversion of the land from agricultural land to residential land; and

(iv) Subdivision of the land.

(c) Clause 5 also provided that if the defendant fails to comply with the requirements mentioned above, the agreement shall automatically be terminated and neither party shall have any claim against the other (save and except for any antecedent breach).

(d) Clause 6(i) provided that the plaintiff is entitled to a refundable deposit of RM200,000, which deposit shall be forfeited in the event of the defendant's default.

(e) Clause 7(i) provided that upon the fulfilment of the conditions precedent, the defendant shall immediately commence the earthworks and infrastructure works in respect of the land and complete all the same within 24 months after the unconditional date.

(f) Clause 7(ii) provided that within 24 months after the unconditional date, the defendant shall complete the bungalows on the plaintiff's lots and deliver vacant possession of the same to the plaintiff, with the certificate of practical completion duly issued by the architect, and with water and electricity ready for connection.

(g) Clause 7(iii) provided that within 30 months after the unconditional date, the defendant shall procure, obtain and deliver to the plaintiff, the certificates of completion and compliance in respect of the bungalows on the plaintiff's lots.

(h) Clause 7(iv) provided that within 36 months from the unconditional date, the defendant shall complete the construction of the bungalow on the shared lot and to procure and obtain the certificate of completion and compliance in respect of the bungalow on the shared lot.

(i) Clause 10(vii) provided that the defendant shall comply with all the enforceable laws, rules and regulations regarding the implementation of the agreement and shall indemnify and keep indemnified the plaintiff from all summons, fines, penalties and compound caused by the defendant's non-compliance of the said laws, rules and regulations.

[5] The defendant proceeded with all the necessary works pertaining to the development and construction of the said land. At all relevant times, the plaintiff was represented by her husband. The said land was at all relevant times charged to Malayan Banking Berhad.

[6] The defendant, together with its team of professionals, then proceeded to liaise with the relevant authorities and agencies, such as Majlis Perbandaran Kajang, Pejabat Daerah/Tanah Hulu Langat, Jabatan Pengairan dan Saliran, SYABAS, lndah Water Konsortium Sdn Bhd, Agensi Perakuan Pembentungan Negeri Selangor, Tenaga Nasional Berhad and Telekom Malaysia Berhad.

[7] The planning permission and/or the development order was issued on 30 April 2013. The defendant obtained the approval for conversion of the said land to residential land and the subdivision of the land on 25 October 2013. Separate titles for the 14 lots were registered on 7 March 2014.

[8] Now it is noteworthy that the approval of the conversion and the subdivision was obtained after the conditional date had expired. The defendant claimed that the plaintiff had full knowledge of the same and never objected to it. Instead, her husband (PW2) gave full cooperation to the defendant in order to obtain the approval.

[9] Be that as it may, on 13 February 2014, the plaintiff by letter gave notice to the defendant of their failure in meeting/fulfilling the conditions precedent within the time frame stipulated. After receipt of the plaintiff's letter, the defendant issued a letter dated 24 February 2014 to the plaintiff enclosing copies of one set of the building plans and site plan. The plaintiff

claimed that the plans submitted and/or given to the plaintiff for her signature were incorrect and not in accordance with the specifications and/or terms agreed to by parties in the agreement.

[10] The defendant subsequently *vide* its letter dated 4 March 2014 acknowledged that there has been a delay in meeting/fulfilling the conditions precedent but went on explain that the delay was caused by a new ruling imposed by Majlis Perbandaran Kajang. The defendant, *vide* its letter dated 19 March 2014, sent to the plaintiff copies of the applications made by the defendant to the relevant authorities. The applications were made by the defendant notably after the expiry of the time stipulated in the agreement to fulfil the conditions precedent.

[11] Even so, it appeared that although the defendant had failed to fulfil the conditions precedent within the time frame stipulated, the plaintiff had admitted to granting to the defendant an extension of time of seven months from 11 September 2013 to 10 April 2014 to fulfil the conditions precedent. Despite the said extension, the defendant nevertheless failed to fulfil the conditions precedent.

[12] The plaintiff then, *vide* its former solicitor's letter dated 22 April 2014, gave notice to the defendant of its failure to meet/fulfil the time frame stipulated despite the extension of time of seven months from 11 September 2013. The plaintiff also informed the defendant that, on a without prejudice basis and for the benefit of the parties, the plaintiff is willing to grant a further extension of time of two months subject to new terms and conditions being agreed to.

[13] The defendant, however, *vide* its previous solicitor's letter dated 7 May 2014, informed the plaintiff that all works under the agreement shall be suspended until the plaintiff agrees to proceed with the terms and conditions of the initial agreement.

[14] On 30 May 2014, the plaintiff filed her action against the defendant and sought, *inter alia*, for the following reliefs:

(a) A declaration that the defendant had breached the terms of the agreement;

(b) A declaration that the plaintiff is entitled to terminate the agreement on the defendant's breach or alternatively that the agreement is terminated automatically;

(c) A declaration that the plaintiff is entitled to forfeit the deposit in the sum of RM200,000 on the defendant's breach;

(d) An order that the defendant hands over vacant possession of the land to the plaintiff forthwith; and

(e) Special and general damages to be assessed.

[15] The defendant in turn filed a counterclaim seeking the following:

(a) A sum of RM9,276,767 being the costs expended by the defendant under the agreement; and

(b) General and special damages.

Decision Of The High Court

[16] After a trial which lasted a total of five days, the learned judge delivered his decision on 30 May 2015 where he dismissed the plaintiff's claim and allowed the defendant's counterclaim as follows:

(a) Special damages in the sum of RM1,194,257.02;

(b) General damages in the sum of RM2,000,000;

(c) Deposit in the sum of RM200,000 to be refunded to the defendant; and

(d) Costs of RM30,000.

The learned judge also made an order that the vacant possession of the 14 lots be returned to the plaintiff.

[17] In essence, the learned judge found that the agreement was not automatically terminated due to the conduct of both parties. This is how the learned judge came to his finding:

> Saya putuskan bahawa kontrak tersebut tidak ditamatkan secara otomatik, berdasarkan tingkah laku yang ditunjukkan oleh kedua-dua pihak di dalam kes ini. Keterangan yang dikemukakan menunjukkan selepas tempoh tersebut tamat Plaintif secara positifnya masih membenarkan Defendan meneruskan usaha mereka untuk mendapatkan kelulusan tersebut.

[18] The learned judge also found that it was the conduct of the plaintiff which had prevented the defendant from continuing with its work thereby unilaterally terminating the agreement. On this the learned judge observed:

> Bagaimanapun kontrak ini ditamatkan kemudiannya disebabkan tingkah laku Plaintif yang menghalang Defendan meneruskan kerja-kerja mereka. Dengan yang demikian Plaintif menunjukkan mereka sudah tidak mahu meneruskan kontrak tersebut dengan menghalang Defendan dari meneruskan kerja-kerja mereka ... Oleh itu pada akhirnya kontrak ini telah ditamatkan oleh Plaintif secara sebelah pihak pada ketika Defendan bersedia melaksanakan tanggungan mereka. Oleh itu kontrak ini telah tamat di atas kesalahan Plaintif.

Our Decision

[19] Aggrieved with the decision of the High Court, the plaintiff filed this appeal to this court. We are acutely aware that an appellate court should exercise restraint in reversing findings of fact made at first instance. Unless there is an obvious error, an appellate court would be slow to interfere.

[20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:

(a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377; [2010] 3 MLJ 509);

(b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1);

(c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149).

[21] In the instant appeal, the judgment of the learned trial judge was assailed on grounds, amongst others, that the learned judge had misapprehended the pleadings, had misdirected himself on the facts and the law when evaluating the facts and the evidence, had failed to appreciate and consider the evidence adduced by the parties and was plainly wrong in arriving at his decision.

[22] In this context, whether the learned judge was plainly wrong in arriving at his decision, would depend very much on the construction of cl. 5 of the agreement. Clause 5 reads as follows:

A Clause 5 - Conditions Precedent

Within one (1) year from the date of this Agreement ("Conditional Period") unless the Parties mutually agree in writing to further extend the same, the Parties shall conduct the following:

B (i) the Company to obtain all the approvals, consents, permits and licences required and any other plans as may be required by the relevant authorities for the development of the Property including but not limited to the following:

(a) Planning Permission, approving the draft layout plans attached hereto as Appendix 1;

C (b) Building Plan Approval for the 3 bungalow units identified as Lots No. 1, 2 and 5 ("Landowner's Lots") approving the draft building plans attached hereto as Appendix 2 together with all other incidental approvals, including but not limited to the approval in respect of the Infrastructure;

D (c) the approval for the conversion of the entire Property from an agricultural land to residential land; and

(d) the approval for the subdivision of the Property,

(collectively, the "Approvals") upon the terms and conditions which are satisfactory to the Landowner;

E (ii) the Landowner shall obtain the approval from the Chargee ("Chargee's Approval"); or in the event of the Landowner failing to obtain the Chargee's Approval, then subject to the Approvals having been procured by the Company, the Landowner shall discharge the Charge in respect of the Property and redeem the Property from the F Chargee at the Landowner's own costs and expenses.

For the purpose of the abovementioned item (ii), the Chargee's Approval shall mean the approval by the Chargee to the Landowner to apply for the subdivision etc and that after the issuance of the issue documents of title ("IDTs"), each IDT may be redeemed G individually from the Chargee; and

(iii) subject to the aforesaid, the Company shall procure the issuance of IDTs for the Bungalow Lots,

(collectively, "Conditions Precedent"), failing which, this Agreement shall automatically be terminated and neither party shall have any H claim against the other (save and except for any antecedent breach), and thereafter the Landowner shall be at liberty to deal with the Property in any manner whatsoever at its absolute discretion. In such event, the Earnest Payment referred to in Item 6 below shall be refunded to the Company.

I Provided however the compliance of item 5(ii) may be waived by the Company and in such event the redemption sums shall be paid by the Company, and it shall be by way of advance and shall be recovered by the Company from the proceeds of the sale of the Shared Lot as provided herein.

> The date when all the Conditions Precedent is fulfilled (or to the extent permitted under the law, waived) is hereinafter referred to as the "Unconditional Date". A

[23] What stands out from this arrangement is the provision setting out the conditions precedent as well as the automatic termination provision which really forms the subject matter of the dispute and the instant appeal. The B defendant contended that the plaintiff allowed time to be at large and acquiesced to the defendant's conduct. It was submitted that the plaintiff did not exercise her right under cl. 5 to automatically terminate the agreement when the defendant failed to fulfil the conditions precedent. In fact, the plaintiff's husband (PW2) gave full cooperation to the defendant to get the C approvals for conversion and subdivision of the land even though the conditional period had lapsed.

[24] Relying on the cases of *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151, *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 and *Hock Huat Iron Foundry v. Naga* D *Tembaga Sdn Bhd* [1999] 1 CLJ 89, the defendant submitted that time was no longer the essence of the agreement and the plaintiff was estopped from relying on the conditions precedent and the conditional period.

[25] It was further contended by the defendant that it had fulfilled its E obligation under the agreement and the delay caused by the statutory requirements was beyond its control. Finally, it was submitted that it was the plaintiff who had breached the agreement by unilaterally varying the terms of the agreement which terms the defendant did not accept. As such, it was asserted that the defendant was entitled to the counterclaim as awarded by the trial judge. F

[26] The plaintiff, on the other hand, contended that it was not disputed that the conditions precedent were not fulfilled within the time frame stipulated in the agreement. Even when the agreement was suspended by the defendant, the condition precedents remained unfulfilled. This much was G conceded by the defendant's managing director (DW1) in his court testimony when he admitted all approvals to commence work had yet to be obtained.

[27] Now the effect of a failure to fulfil a condition precedent has been the subject of many case authorities. For the purpose of this appeal, it will suffice to refer to the case of *Langkawi R&D Academy Sdn Bhd v. Ketua Setiausaha* H *Kementerian Pertahanan Malaysia & Ors* [2013] 3 CLJ 1006; [2012] 5 MLJ 662, where this court, through the judgment of Abdul Malik Ishak JCA, had occasion to observe as follows (at p. 1025 (CLJ); p. 676 (MLJ)):

> A contract is subject to a condition precedent when the contract is not binding unless or until a specified event occurs. Thus, where the condition is precedent, the agreement is not fully binding until the event occurs. The I non-fulfilment of a condition precedent will result in the contract being discharged, either automatically or at the election of one of the parties.

[28] In the instant case, the parties had agreed that the conditions precedent as set out in the agreement had to be complied with within the time stipulated for the contract to remain valid and binding. Since there was failure to do so in this case, it must follow that the contract was automatically discharged. This crucial issue appeared to have been overlooked by the trial judge. It cannot also be the case that time was no longer of the essence and was at large as the time period itself was a condition precedent for the contract to be binding.

[29] In our view, it was also significant that failure to fulfil the conditions precedent would render the contract automatically terminated as stated in cl. 5 of the agreement. The leading local authority on the applicability and effect of an automatic termination clause is the recent Federal Court case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 ("*Dream Property*"). The dispute in that case revolved around the termination of a sale and purchase agreement ("SPA") for a parcel of land. There was a failure by the vendor to pay the balance of the purchase price within the stipulated time period. In the meantime, while the case was going on in the courts, the vendor had with permission entered possession and completed the construction of a commercial complex which then had ongoing businesses and tenants on the premises in question.

[30] One of the issues in the *Dream Property* case was the effect of cl. 12 of the SPA which provided for the agreement to be treated as null and void and of no further effect if the balance of the purchase price was not paid within the stipulated time period. On this issue the Federal Court, through the judgment of Azahar Mohamed FCJ, stated (at p. 481 (CLJ), p. 469 (MLJ)):

> In our view, whether or not a clause in an agreement has the effect of providing for automatic termination and confers on a party a right to immediate termination, must be considered by the words used by the parties in the particular agreement and this will depend very much on the circumstances of each individual case. In the present case, however, what stands out is that on a matter of substance, cl 12 expressly provides that 'the contract shall be treated as null and void and of no further effect'. The contractual language is clear and plain enough. That explicit and unambiguous words must be given its literal meaning. The immediate consequence of the termination compellingly favours the view that automatic termination was intended by the plaintiff and the defendant when they mutually agreed to be bound by the SPA. In our view, cl 12, as a contractual term explicitly agreed between the plaintiff and the defendant, provides for the automatic termination of the SPA upon the defendant's failure to pay the balance purchase price within the stipulated time period. In such a situation, there was no requirement for a notice of termination to be issued by the plaintiff to the defendant.

[31] Reverting to the instant appeal, in view of the automatic termination clause set out in cl. 5 of the agreement, there was no longer any requirement of any notice of termination. Once the conditions precedent were not fulfilled within the stipulated period or any agreed extended period, the agreement

would automatically come to an end. So when the plaintiff's solicitors sent the letter of 22 April 2014 giving notice that the conditions precedent were not complied with and offering a further extension with new conditions which was not accepted by the defendant, the contract came to an end there and then by virtue of cl. 5 of the agreement. There was no ambiguity in what the parties signed up for. The court is then duty bound to uphold what the parties had bargained for in the agreement and more particularly cl. 5.

[32] In our view, the learned judge fell into error when he found that time was no longer of the essence and was indeed at large. The correct position was that once the conditions precedent were not fulfilled within the stipulated period, the contract became null and void and the parties were then relieved from performing the rest of the obligations. At the risk of repetition, contrary to the finding by the learned judge, there was no breach by the plaintiff. It was the defendant who had failed to fulfil its promise to obtain all the approvals as stated in cl. 5, which were stipulated to be the conditions precedent which were to be performed by the unconditional date which included any agreed period of extension.

[33] In the circumstances, and with respect, the learned judge had failed to apply the trite principles of law relating to an automatic termination clause thus resulting in a fundamental misdirection. The learned judge's finding that the automatic termination clause did not apply was plainly erroneous in the face of overwhelming evidence which indicated otherwise. This failure warranted appellate interference in favour of the plaintiff.

Conclusion

[34] In the circumstances, and for the reasons we have given, we are of the view that the decision of the High Court was plainly wrong. Accordingly, we allowed the appeal and set aside the order of the High Court. In substitution, we allowed the declaration sought by the plaintiff/appellant that the agreement was automatically terminated with the result that the deposit of RM200,000 was to be refunded to the defendant/respondent. The counterclaim was without merit and was dismissed. There would also be an order, which was also ordered by the High Court, that the defendant/respondent hands over vacant possession of the said land to the plaintiff/appellant forthwith. Lastly, the defendant/respondent to pay to the plaintiff/appellant costs here and below in the sum of RM40,000 subject to payment of allocator fees and deposit to be refunded to the plaintiff/appellant.

Order accordingly.